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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 370

DOROTHY C. DUDDLESTON, JOHN P. GALLAGHER, MILES H. MARSHALL, LOUIS Y. MUNDY,
Intervening Plaintiffs and Appellants,

NELSON G. GRILLS,
Plaintiff and Appellee,

vs.

ROGER D. BRANIGIN, EDWIN M. S. STEERS, JAMES NOLAND, As Members of the Indiana State Election Board,
Defendants and Appellees.

APPELLANTS' OPPOSITION BRIEF TO APPELLEES' MOTION TO AFFIRM.

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Appellees' Motion to Affirm and their Brief in support thereof not only fails to substantiate an affirmance of the lower Court's decision, but actually supports Appellants' contention that the lower Court's decision is contrary to the guideline established by the United States Supreme Court in *Wesberry* v. *Sanders*—376 US 1, 84 S. Ct. 526, 11 L. Ed. 2nd 481 (1964).

On Page 2 of their Motion to Affirm and Brief in support thereof, the Appellees state that they "do not disagree" with the point that:

> "If township, town and city borders were used as boundaries to a greater extent in the 1965 Indiana Districting Act the population difference between districts could be held to less than 1%."

On Page 2, they also state:

> "If the use of such boundaries should be necessary to establish equally populated districts, then such boundaries must be used no matter what the historical precedent."

On Page 3, they state:

> "... there can be no disagreement over the proposition that using smaller population units as the basis for forming Congressional Districts would result in more numerically equal District populations."

On Page 6, they state:

> "A county is not, and never was, an independent sovereign whose boundaries must remain inviolate. A county, when necessary, may be so divided that portions of it are contained in different Congressional Districts."

After all of these admissions, the Appellees assert on Page 8:

> "In short, the General Assembly of Indiana has established Congressional Districts that are as nearly of equal population as is practical":

The Appellees on Page 4 rely on the Orwellian proposition that there are degrees of constitutionality. Some acts are more constitutional than others.

On Page 6, they attempt to minimize the population disparity by reducing the weight of a "single vote compared

to the average'' and measure such weight in the thousandth degree of a percentage point.

On Pages 6 and 7, the Appellees assert that ''Counties'' must be considered in Congressional reapportionment, along with ''organization of political parties sponsoring candidates,'' and ''elections.'' They state that another factor to be considered (see Page 7) is that of determining districts containing a ''manageable number of units.'' They state that, ''The trick is to combine the units . . . into . . . districts.''

The Appellees then complain of the time consumed in performing this ''trick'' and state:

> ''Unfortunately, there is nothing to *increase the amount of time* a state legislature may devote to such experiments. Using cities, townships, and towns as population units might . . . produce districts more mathematically equal in number. It is much more apt to fail to produce any reapportionment.'' (Emphasis added.)

It is respectfully submitted that Congressmen represent people and not counties.

On August 5th, 1966, a three-Judge Panel Court in the United States District Court for the Western District of Missouri, Central Division, in a cause entitled *Paul W. Preisler,* et al v. *The Secretary of the State of Missouri,* et al, Cause #1064, rendered a decision holding unconstitutional the 1965 Congressional Reapportionment Act of the State of Missouri. The opinion has not been reported as of this date.

The facts and issues of *Preisler* et al v. *The Secretary of the State of Missouri,* supra are almost identical to the facts and issues involved in this Indiana case being appealed to the United States Supreme Court. The average population of the congressional districts in Missouri is

431,981, while in Indiana it is 423,863. The widest variation between districts in Missouri totalled 84,655, while the widest variation in Indiana totalled 84,545—a difference of 110 population.

The Missouri Federal District Court reached a decision diametrically opposed to the Indiana Federal District Court's opinion herein. The Missouri Federal Court commented on this as follows:

> "Again for the sake of clarity, we state our express disagreement with the rationale of *Moore* v. *Moore*, S. D. Ala. 1965, 246 F. Supp. 578, 18 and *Grills* v. *Branigin*, S. D. Ind. No. IP-64-C-101, decided February 18, 1966, but not yet reported.
>
> The factual situation in *Grills*, involving the 1965 Indiana Act, is comparable. The maximum variance between Missouri's smallest and largest districts exceeded that approved by the Indiana three-Judge Court in that case by only 110 population. Population variances of 84,655 and 84,545, respectively, involving a difference of only 110 population, calls for an application of the *de minimus* doctrine in quite a different way than we believe it should be applied in a congressional districting case. Such variances involve approximately a third of the total votes necessary to elect or defeat a single Congressman. Contrary to the majority opinion in *Grills* v. *Branigin*, we do not believe that the statement of such obvious over-weighting of the votes of population is made any smaller by stating the facts in terms of percentage figures. We reiterate our disagreement with the majority's opinion in *Grills* v. *Branigin* and state that we are in general agreement with the strong dissenting opinion of District Judge Cale J. Holder."

The scholarly decision rendered by the Missouri Federal *District Court* in *Preisler et al* v. *The Secretary of the State of Missouri*, supra is an excellent analysis of the law applicable to this Indiana Federal District Court case

herein appealed. The following excerpt from said opinion is adopted by Appellants as a part of this brief:

> "The constitutional standard against which Missouri's (Indiana's) 1965 Congressional Redistricting Act must be measured was definitively established by *Wesberry* v. *Sanders*. The Supreme Court there stated: 'We hold that, construed in its historical context, the command of Art. I, § 2 . . . means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's.' (l.c. 7-8 of 376 U. S.). The Supreme Court repeatedly emphasized that population was to be the sole factor to be considered in Congressional reapportionment cases. On pages 8 and 9 of 376 U. S. it held that 'the history of the Constitution, particularly that part of it relating to the adoption of Art. I, § 2, reveals that those who framed the Constitution meant that, no matter what the mechanics of an election, whether statewide or by districts, it was population which was to be the basis of the House of Representatives.' And on page 13 of 376 U. S. it was stated that 'the debates at the Convention make at least one fact abundantly clear: that when the delegates agreed that the House should represent "people" they intended that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants.' Again, on page 14 of 376 U. S., it was stated:
>
> > It would defeat the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people—for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater value in choosing a Congressman than others.
>
> "*In Bush* v. *Martin*, S. D. Tex. 1963, 224 F. Supp. 499, decided before *Wesberry* v. *Sanders*, Judge R. Brown contrasted 'the problem (of congressional redistricting) with that of the composition of State Leg-

islatures' (224 F. Supp. at 511). Reasoning from *Gray* v. *Sanders,* 372 U. S. 368 (1963), and *Scholle* v. *Hare,* 369 U. S. 429 (1962), Judge Brown suggested that 'the present indications are that considerable leeway must be allowed the States in the diffusion of its political initiative' (224 F. Supp. at 511). As to the different question of congressional representation, and with specific reliance upon Art. I, § 2 and the history of the Great Compromise as set forth in Warren, The Making of the Constitution, 141, 159, 163, 220-312 (1927), and Padover, To Secure These Blessings, 152-88, 285-301 (1962), Judge Brown, in anticipation of what was later held in *Wesberry* v. *Sanders,* stated at 511:

> But here we deal with a legislative assembly which, by the Constitution and because of the Great Compromise giving rise to that Constitution, is to bear a direct relation to population, and, at least as between the States, population only. . . . The simple constitutional fact is that so far as (a) the standard of composition of the Congress is concerned, as distinguished perhaps from (b) the standard governing the time and circumstance permitting or requiring judicial intervention, Members of Congress are to be elected on the basis of population and nothing else.

"The validity of Judge Brown's definitive holding that the standard of congressional districting was population alone was sharply contested by Judge James L. Noel, Jr. in his dissenting opinion. See page 519 of 224 F. Supp. Judge Noel there italicized that portion of Judge Brown's opinion that stated *'Members of Congress are to be elected on the basis of population and nothing else'* in order that precise attention be focused upon the point of judicial disagreement.

"Judge Brown was affirmed and Judge Noel's dissent was rejected by the Supreme Court's affirmance of *Martin* v. *Bush,* on March 2, 1964 by per curiam

opinion reported in 376 U. S. 233, on the authority of *Wesberry* v. *Sanders,* which had been decided two weeks earlier on February 17, 1964.

"On the same day that *Wesberry* v. *Sanders* was decided, the Supreme Court also decided *Wright* v. *Rockefeller,* 376 U. S. 52 (1964), where an attack was made on the congressional districting of the State of New York under the Equal Protection Clause of the fourteenth Amendment. Mr. Justice Black, also the author of *Wesberry* v. *Sanders,* affirmed the district court's finding that the Equal Protection Clause had not been violated, and, noting the same basic distinction that Judge Brown had noted in *Bush* v. *Martin,* further stated:

> We do not pass on the question . . . not presented here, that is, whether the state apportionment is constitutionally invalid because it may fail in its objective to create districts based as nearly as practicable on equal population. See *Wesberry* v. *Sanders, ante,* p. 1. Since no such challenge has been urged here, the issues have not been formulated to bring it into focus, and the evidence has not been offered or appraised to decide it, our holding has no bearing *on that wholly separate question.* 376 U. S. at 58. (Emphasis ours.)

"That the question presented by an attack under Art. I, § 2 is a 'wholly separate question' from that presented by an attack under the Equal Protection Clause of the fourteenth amendment was also emphasized in *Wesberry* v. *Sanders* itself. In footnote 10 on page 8 of 376 U. S., Mr. Justice Black held that because *Wesberry* v. *Sanders* was decided under Art. I, § 2, 'we do not reach the arguments that the Georgia statute violates the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment.'

"We do not share the surprise some commentators have noted that the Supreme Court applied Art. I, § 2 to congressional redistricting instead of considering the Equal Protection Clause of the fourteenth amend-

ment as the only clause under which the validity of a congressional redistricting plan could be tested.

"Almost a hundred years ago, in times more politically troubled than our own, the Supreme Court laid the foundation upon which *Wesberry* v. *Sanders* is based. In *Ex Parte Yarbrough*, 110 U. S. 651 (1884), Mr. Justice Miller, speaking for a unanimous court, answered the argument that 'the right to vote for a member of Congress is not dependent upon the Constitution or laws of the United States, but is governed by the law of each State respectively', 110 U. S. at 662-663. That case held that 'it is not correct to say that the right to vote for a member of Congress does not depend on the Constitution of the United States' (110 U. S. at 663). Article I, Section 2 was specifically identified as the controlling provision of the Constitution and, after quoting that section, the Supreme Court explained that 'the States in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress . . . They define who are to vote for the popular branch of their own legislature and the Constitution of the United States says the same persons shall vote for members of Congress in that State' (110 U. S. at 663). 'It is not true,' Mr. Justice Miller held in conclusion, 'that electors for members of Congress owe their right to vote to the State law. . . .' (110 U. S. at 663.)

"Mr. Justice Stone added over a quarter of a century ago in *United States* v. *Classic*, 313 U. S. 299 (1941) at 314, that 'Section 2 of Article I commands that Congressmen shall be chosen by the people of the several states'. He noted on page 315 that 'while, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states . . . this statement is true only in the sense that the states are authorized by the Constitution to legislate on the subject as provided by § 2 of Art. I, . . .'. *Ex Parte Yarbrough* was among the cases cited and relied upon.

"Most important for our present discussion, Mr. Justice Stone emphasized in *Classic* that the protection of a citizen's right to vote in a federal election was entirely separate from the protection of his right to vote in a State election. The separate rights are protected by entirely different constitutional provisions. 'Since the constitutional command (of Art. I, § 2) is without restriction or limitation,' Mr. Justice Stone held, 'the right, *unlike those guaranteed by the Fourteenth and Fifteenth Amendments,* is secured against the action of individuals as well as of states' (313 U. S. at 315, emphasis ours.)

"Plaintiffs in this case seek to protect their rights as conferred by Art. I, § 2 to vote in a federal election. The question of whether those rights have in fact been abridged must be adjudicated under the cases applicable to that question and not under Equal Protection Clause rules applicable to abridgments of their wholly separate right to vote in State elections, which are, to use the words of *Classic* in 1941, 'unlike those guaranteed' by Art. I, § 2, or to use the more recent words of *Wright* v. *Rockefeller, supra,* which present a 'wholly separate question.' (376 U. S. at 58.)

"Both *Ex Parte Yarbrough* and *Classic* were cited and relied upon by Mr. Justice Black both in his dissent in *Colegrove* v. *Green,* 328 U. S. 549 at 570 (1946), and in his opinion in *Wesberry* v. *Sanders,* 376 U. S. at 17 (1964). In his *Colegrove* dissent he stated that 'Article I provides that Congressmen "shall be . . . chosen . . . by People of the several States" ', and, specifically in reliance upon *Ex Parte Yarbrough,* held that Article I 'thus gives those qualified a right to vote and a right to have their vote counted.' (328 U. S. at 570.)

"Almost twenty years before *Wesberry* v. *Sanders* was decided, Mr. Justice Black precisely stated in his dissent in *Colegrove* that Art. I, § 2 requires a State legislature to establish Congressional districts under which '*so far as feasible,* votes be given equally effective weight.' (328 U. S. at 571.) Earlier on that same page the same thought was expressed by use of

the words 'to the extent that it is *practically feasible* (all citizens shall) be given equal representation.'

"The words 'so far as feasible' and the words 'practically feasible' in Mr. Justice Black's *Colegrove* dissent expressed the same idea that became the supreme law of the Land when *Wesberry* v. *Sanders* held that Art. I, § 2 must be taken to mean that congressional districts must be of equal population *'as nearly as is practicable.'*

"After *Baker* v. *Carr*, 369 U. S. 186 (1962), had been decided we do not believe anyone should have been surprised that the dissents in earlier apportionment cases, both congressional and State, would be adopted as the rule of the Supreme Court in cases decided after that landmark case.

"The basic constitutional principle of equal representation established by Art. I, § 2 forbids and eliminates, so far as congressional representation is concerned, the consideration of any factor other than population. Use of such words as 'feasible' and 'practicable' in a careful statement of the fundamental constitutional principle constitutes but a recognition that the familiar doctrine of *de minimis* is applicable and is designed to make clear that a State legislature would not be expected to create entirely new political subdivision lines in order to have absolute and precise mathematical equality in its congressional districts.

"Various courts other than the Supreme Court have stated the basic constitutional principle of equal representation applicable to congressional districting in words as unequivocal as those used repeatedly in *Wesberry* v. *Sanders*.

"For example, *Calkins* v. *Hare*, E. D. Mich. 1964, 228 F. Supp. 824 at 829, in which it was held that 'one factor and one alone is controlling, the factor of population.' *Meeks* v. *Anderson*, D. Kans. 1964, 229 F. Supp. 271 at 273, held that 'one factor, and only one, may be taken into account in apportioning and establishing the congressional districts among the people of a state and that factor is population.' And *Bush* v.

Martin, supra, subsequently affirmed by the Supreme Court, in addition to what has already been quoted, stated the applicable constitutional principle still another way: 'Members of Congress are to be elected on the basis of population and nothing else.' (224 F. Supp. at 511.)

"The concept that population and population alone is the sole standard for congressional representation requires that acceptance of invitations to examine population deviations and variations in terms of stated mathematical formulae be limted to discussion of such matters only as they may tend to illuminate the factual situation presented in a particular case.

"When legal arguments are based on the theory that a particular congressional districting scheme is only slightly unconstitutional and should be sustained because the votes of the population of a particular district are, in fact, overvalued and overweighted by 'only' a plus 9.9% deviation and a minus 9.6% deviation, to use the figures involved in this case, such arguments should be, and are in this case, firmly rejected.

" 'We do not propose,' to use the words of Judge Talbot Smith in *Calkins* v. *Hare,* 'to be drawn into a sterile controversy over averages and percentages, whether 9%, 15%, or other.' (228 F. Supp. at 828.) Judge Smith added that the 'as nearly as practicable' words of *Wesberry* v. *Sanders* can not be utilized as 'an escape hatch for the reluctant.' (228 F. Supp. at 829.)

"We believe that *Calkins* v. *Hare* correctly put its finger on the reason why a numbers game cannot be played in ruling the legal questions presented in a congressional redistricting case. That case held:

> We do not measure constitutional rights in these terms. They set up wholly false standards. That the average man gets due process in our courts does not justify railroading some luckless scoundrel every now and then. Nor is it an answer to charge of unconstitutional disfranchisement that only 10,000 people are deprived of their right to vote, this being but a small percentage of the

> entire voting population. These 10,000 have a right to vote equally with others, no matter what percentage of the total they comprise. We take this to be as clear as the proposition that none of our pepole can be denied their free right of worship no matter how small the sect, and that none of our people shall be deprived of their right of free speech, no matter how obnoxious to most of us their doctrines (228 F. Supp. at 828).

"'The short of the matter,' to borrow further the words of *Calkins* v. *Hare,* 'is that a citizen can either vote equally with his peers or he cannot.' 'If he cannot,' that case continued, 'and we find he cannot with respect to congressional elections in Michigan, his constitutional rights have been abridged' and the statute must be held to be unconstitutional. 228 F. Supp. at 828.

"We make the same finding and holding with respect to congressional elections in Missouri under the 1965 Act. We refuse to hold that the constitutional right of equal representation may be but slightly, and therefore permissibly, abridged on the theory that percentage figures and ration numbers make unexplained and substantial population deviations and variances look smaller.

"Any possible doubt that population and population alone is the sole standard for congressional redistricting was removed by recent Supreme Court cases dealing with North Carolina and Maryland congressional redistricting."

Drum v. *Seawell,* M. D. N. Car. 1965, 249 F. Sup. 877; affirmed 383 U. S. 831.

Maryland Citizens Comm. for Fair Cong. Redist. Inc. v. *Tawes,* D. Md. 1964, 226 F. Supp. 80; affirmed by U. S. Sup. Ct. May 31, 1966 (34 Law Week 3406).

Appellees' Motion to Affirm should be overruled, and in light of the admissions contained therein this case should

be advanced on the docket and the decision reversed, and the cause remanded to the trial court with instructions to enter judgment for the Intervening Plaintiffs and Appellants for relief prayed for in their Complaints.

Respectfully submitted,

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PROOF OF SERVICE.

I, Buena Chaney, attorney for Dorothy C. Duddleston, John P. Gallagher, Miles H. Marshall, and Louis Y. Mundy, Intervening Plaintiffs and Appellants herein, and being first duly sworn, upon my oath, depose and say that on the ..... day of August, 1966, I served copies of the foregoing Appellants' Opposition Brief to Appellees' Motion to Affirm on the several parties thereto as follows:

1. Defendants, Roger D. Branigin, Edwin M. S. Steers and James E. Noland, as members of the State Election Board of Indiana, by mailing a copy in a duly addressed envelope with first-class postpage prepaid to John J. Dillon, Attorney General of the State of Indiana, who is the Attorney of Record for said named defendants at his office in the State House, Indianapolis, Indiana.

2. Nelson G. Grills, Plaintiff pro se, by mailing a copy in a duly addressed envelope with first-class postage prepaid to his address of 1669 East Kessler Boulevard, Indianapolis, Indiana.

And further Affiant saith not.

BUENA CHANEY.

STATE OF INDIANA, }
COUNTY OF VIGO. } SS.:

Subscribed and sworn to before me, a Notary Public in and for said County and State, this ..... day of August, 1966.

Witness my hand and seal.

LAEL D. HIRE,
Notary Public.

My commission expires: May 22, 1967.